The Present New Antitrust Era

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THE PRESENT NEW ANTITRUST ERA

BARAK ORBACH*

ABSTRACT

Antitrust scholars frequently refer to an “ideological pendulum” to describe the rise and fall of trends in the evolution of antitrust law. This pendulum arguably swings between fairness and laissez-faire visions, while a technocracy vision moderates its motion. Mapping key phases in the evolution of antitrust law, I argue that a new antitrust era with distinctive characteristics has been forming in recent years.

The present new antitrust era is a product of growing tensions and contradictions among policy prescriptions. After several decades in which antitrust was a specialized field that drew little public attention, in the aftermath of the Great Recession, antitrust became a proxy for disagreements over economic policies. Today, antitrust law exemplifies striking discrepancies among positions advanced by the Supreme Court, the established antitrust technocracy, political populism, and economics. This resurrection of public and political interest in antitrust, I argue, marks the end of one antitrust era and the beginning of another.

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INTRODUCTION

Three conflicting visions have shaped the evolution of antitrust law—fairness, laissez faire, and technocracy. I examine the evolution of antitrust law through the changes in the popularity and influence of these visions over the years. I argue that a new antitrust era with distinctive characteristics has been forming in recent years.

The fairness vision builds on a collection of ideas that condemn business size and portray profit-seeking commercial activities as a source of undesirable distributive effects. Louis Brandeis’s essays about trusts and combinations epitomize this line of thinking. Donald Turner famously described the fairness attitude as “inhospitality in the tradition of antitrust law.”

The laissez-faire vision recognizes that, in theory, restraints of trade may harm competition, but emphasizes the potential costs of antitrust enforcement and skepticism of the plausibility and viability of anticompetitive restraints. Frank Easterbrook’s influential formulation of antitrust’s false positives typifies this line of thinking. Easterbrook hypothesized that, in antitrust, “judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.” The Supreme Court adopted this conjecture as a guiding principle for antitrust law.

5. See, e.g., George L. Priest, The Limits of Antitrust and the Chicago School Tradition, 6 J. COMPETITION L. & ECON. 1, 2-3 (2010).
7. Id. at 3.
The technocracy vision provides that the exercise of government functions by experts insulates policies from ideological influences and populist sentiments, such as fairness and laissez-faire fads. Antitrust technocracy rests on two beliefs. First, “antitrust law has had and still has some undesirable features that the courts or Congress should correct.” Second, the “proper approach [for] government enforcement agencies [is] not to bring cases solely on the basis that they would be upheld because of past precedents.” Rather, the government should bring cases because “they should be upheld,” including “for the purpose of persuading the Supreme Court to reverse precedents.” Beliefs that antitrust expertise reached some plateau protected by a broad consensus among experts have resurfaced several times since the enactment of the Sherman Act. These beliefs have always been somewhat aspirational and much exaggerated. A technocracy hype during the 1920s and 1930s inspired the idea of antitrust technocracy. Then, antitrust technocracy struggled with incoherent and conflicting policies.

In 1964, when the fairness vision dominated antitrust law, Richard Hofstadter argued that with the “growing public acceptance of the large corporation,” antitrust had “lost its role in our society” and became “the almost exclusive concern of a technical elite of lawyers and economists.” Similarly, in 1979, as the laissez-faire vision was ascending, Richard Posner claimed that “a shift from disagreement over basic premises, methodology, and ideology toward technical disagreements” built a “growing consensus” among
antitrust experts. In the past two decades, however, many antitrust experts argued that the decline of the Chicago School in the 1990s allowed professional technocracy to replace antitrust ideology, contributing to nuanced and balanced antitrust enforcement. Nonetheless, the present technocracy has been facing an ideological jurisprudence that has persistently narrowed the substantive scope of antitrust law. Since the Great Recession, antitrust enforcement has been facing growing criticism for its permissible standards and neglect of the rising concentration in the economy.

The digital revolution, which began in the mid-1970s, gave new life to old fears of large businesses and beliefs that antitrust law should address the wealth effects caused by rapid technological change. These sentiments grew considerably in the aftermath of the Great Recession. Commentators with varying degrees of expertise and understanding of antitrust law reintroduced the public to old beliefs that antitrust law could resolve many economic problems. Resentments of the new economic elite and its impact on society, as well as criticism of the technocracy that allegedly neglected the changes in the economy, offered political capital for attacks on the establishment and various elites. While it is far from clear that these sentiments and the recent populist surge will...

18. See infra Part II.D.
20. See id.
21. See id.
dramatically influence antitrust policies, they demand reevaluation of antitrust law. Examined in the context of the evolution of antitrust law, the recent developments, I argue, account for the beginning of a new antitrust era.

I. PAST ANTITRUST ERAS

Antitrust law has evolved through four primary phases: (1) the formative era (1890-1911); (2) the first rule of reason era (1911-1935); (3) the fairness era (1935-1975); and (4) the second rule of reason era (1975 to some point in recent years). Each phase began and ended gradually, rather than through events that established sharp turns in the direction of antitrust law. Thus, references to the beginning and end of each period are somewhat imprecise. Correspondingly, descriptions of transition points in the literature are not uniform, yet hardly present meaningful disagreements among scholars.

A. The Formative Era, 1890-1911

Antitrust’s formative era took place from the 1890 enactment of the Sherman Act to the 1911 adoption of the rule of reason. During this period general antitrust norms formed through judicial interpretations of the Sherman Act. These norms utilized public restraints on businesses to protect the vitality of markets from private restraints of trade. The process produced debates and controversies over the constitutionality and reach of the Sherman Act. Standard Oil (1911) and American Tobacco (1911) concluded the core controversies. In each case, the Court ordered the dissolution of a massive trust, demonstrating that the Sherman Act may be used to impose meaningful restrictions on businesses. At the same time, the Court used both decisions to soften the sweeping language of the

22. See WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 100-237 (1965).
Sherman Act, ruling that only “unreasonable” restraints of trade violate the Sherman Act.25

The impetus for the enactment of antitrust legislation in the United States was the Second Industrial Revolution that took place from 1870 to 1914.26 New technologies enabled, for the first time in history, the development of mass production and mass distribution in many industries.27 Industrial giants emerged and displaced small businesses, automation eliminated numerous jobs, and tensions between capital and labor soared.28 The enactment of the Sherman Act responded to growing public demands to address the influence of large businesses on the economy, then known as the “trust problem.”29 Nonetheless, the Sherman Act was a “curious phenomenon.”30 A Republican Congress supportive of the trusts passed antitrust legislation.31 When the Sherman Act was drafted and debated, the Republican Party controlled the White House and Congress.32 The party was “dominated ... by many of the very industrial magnates most vulnerable to real antitrust legislation.”33 The idea of antitrust measures, thus, had a broad public support but was not a high priority for the Republican Party. Rather, under a Republican leadership, Congress focused on tariffs that protected American monopolies from competition.34 As a result, the Sherman Act was anything but well-considered legislation.35

During antitrust’s formative era, courts developed general standards for the interpretation of antitrust law. Most importantly, the Supreme Court ruled that the Sherman Act prohibits only

27. See id. at 53-56.
28. See id. at 194-96.
29. See Letwin, supra note 22, at 7.
31. See id.
32. See id.
33. Id.
35. Hans B. Thorelli, The Federal Antitrust Policy 164-224 (1954); see also United States v. Trans-Mo. Freight Ass’n, 166 U.S. 290, 318 (1897) (“It is] impossible to say what were the views of a majority of the members of each house in relation to the meaning of the [Sherman Act].”)
unreasonable restraints of trade, not all restraints,\footnote{Standard Oil, 221 U.S. at 54 (adopting the rule of reason).} and that restraints of trade may include mergers and restraints on production.\footnote{N. Sec. Co. v. United States, 193 U.S. 197 (1904), overruling United States v. E. C. Knight Co., 156 U.S. 1 (1895) (holding that unlawful restraints of trade may include restraints of production and mergers).} Notably, the Supreme Court also adopted a per se rule—a ban on resale price maintenance (RPM).\footnote{Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).} In a nonantitrust case, New York Central Railroad (1909), the Supreme Court held that corporations might be criminally liable for acts committed by employees acting within the scope of their employment.\footnote{N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).} This ruling is one of the most consequential decisions of the Court, establishing a path for criminal prosecution of businesses.

\textit{Trusts at the Senate}

\textit{The Bosses of the Senate}, Puck, January 1889.

Depicting a wide open “entrance for monopolists,” a bolted and barred small “people’s entrance,” a sign stating “This is the Senate of the Monopolists by the Monopolists and for the Monopolists!,” and the large trusts looming over small senators.
Many scholars have pointed out that the formative era of antitrust law and the formative era of laissez-faire constitutionalism overlapped. The formative era of laissez-faire constitutionalism was longer, stretching from The Slaughter-House Cases (1873) to West Coast Hotel (1937), with Lochner (1905) symbolizing the era and its spirit. It began before the enactment of the Sherman Act and defined the Supreme Court’s jurisprudence long after the formative era of antitrust law ended. The overlap accounts for the limited effectiveness of the fairness vision during antitrust’s formative era. Rising antitrust sentiments pressured politicians across the political spectrum to condemn large businesses. Importantly, in Santa Clara (1886), the Court declared that the Equal Protection Clause of the Fourteenth Amendment intended to protect corporations, not only “natural persons.” But, as Justice Black pointed out (decades after Santa Clara), “[n]either the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection.”


41. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83-101 (1873) (Field, J., dissenting); W. Cost Hotel Co. v. Parrish, 300 U.S. 379 (1937). The Slaughter-House Cases addressed the question of whether the Fourteenth Amendment was intended to protect business interests. Writing for the Court, Justice Miller wrote that the Fourteenth Amendment’s “pervading purpose” was “the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.” The Slaughter-House Cases, 83 U.S. at 71.


44. Several scholars documented ethical conflicts and ideological rigidity that defined Justice Stephen Field, a laissez-faire icon. See, e.g., Howard Jay Graham, Justice Field and the Fourteenth Amendment, 52 YALE L.J. 851, 870, 874-875 (1943).


The far-reaching effects of this constitutional interpretation continue to shape national economic policies.47

B. The First Rule of Reason Era, 1911-1935

Antitrust’s first rule of reason era took place from 1911 to the 1935 invalidation of the National Industrial Recovery Act (NIRA), which partially suspended the enforcement of the antitrust laws.48 During this period, the Supreme Court developed reasonableness standards primarily to narrow the scope of antitrust law.49 In 1914, Congress passed the Clayton and Federal Trade Commission (FTC) Acts responding to concerns that the rule of reason emasculated the Sherman Act.50

Two threads of ideas curbed antitrust enforcement during the first rule of reason era. First, the majority of the Supreme Court Justices were committed to laissez-faire constitutionalism and saw in antitrust enforcement a threat to economic liberties. Second, critics of the trusts advanced theories about “new competition” as an alternative to “crude and brutal competition.”51

Proponents of laissez-faire constitutionalism successfully opposed prosecution of dominant firms.52 For example, in United Shoe (1918),53 Colgate (1919),54 U.S. Steel (1920),55 and Kodak (1927).56

47. See, e.g., Citizens United v. FEC, 558 U.S. 310 (2010).
49. See, e.g., Hofstadter, supra note 15, at 115 (naming the period the “era of neglect”).
52. Peritz, supra note 40, at 59-110; Kovacic & Shapiro, supra note 17, at 46-49 (arguing that the era represented “the longest lapse for the enforcement of antitrust controls on dominant firm behavior”).
53. United States v. United Shoe Mach. Co., 247 U.S. 32 (1918) (rejecting the possibility that a dominant firm had the power to coerce customers to accept its terms).
55. United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (refusing to condemn a dominant firm that had competitors).
56. FTC v. Eastman Kodak Co., 274 U.S. 619 (1927) (finding that acquisitions of a
the Supreme Court dismissed claims that dominant firms violated Section 2 of the Sherman Act. At the same time, beliefs that collaborations among competitors could combat the illnesses of industrialization and protect democracy made heavy inroads into antitrust law. “Associationalism,” also known as the “fair trade movement,” was an influential political-economic movement that prescribed collaborations among competitors through civic associations, such as trade associations, professional societies, labor unions, and cooperatives, to promote constructive competition.57

Consistent with this vision, the federal government actively encouraged collaborations among competitors and courts developed the rule of reason in a pursuit of an elusive distinction between constructive and destructive collaborations among competitors.58 NIRA’s “codes of fair competition” and suspension of antitrust restrictions on collaborations among competitors were products of this vision.59 Many antitrust landmarks from the era examine the legality of various collaborations among competitors and, specifically, “open price associations.”60 For example, Chicago Board of Trade (1918) examined trading rules that a commodity exchange set for its members;61 U.S. Steel (1920) concerned, in part, social events in which steel executives exchanged information;62 Eastern States (1914), American Column & Lumber (1921), and Maple Flooring (1925) examined information exchanges and other collaborative standards of trade associations;63 National League (1922) created the so-called Baseball Exemption;64 Pacific States Paper Trade (1927) condemned price-fixing arrangements of trade associations;65

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57. Sawyer, supra note 51.
63. E. States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600 (1914); Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921); Maple Flooring Mfrs.’ Ass’n v. United States, 268 U.S. 563 (1925).
Trenton Potteries (1927) held that price-fixing by a trade association was unlawful per se; Paramount Famous Lasky (1930) reviewed the legality of mandatory arbitration clauses set by a trade association; Standard Oil (1931) upheld a patent pool, and Appalachian Coals (1933) upheld the legality of a miners’ cooperative.

“Open price associations,” namely, information exchanges among competitors that were loosely affiliated through a trade organization, were one of the key mechanisms that associationists promoted; these associations intended to “stabilize” prices and prevent “unfair competition.” The Supreme Court evaluated the legality of open price associations in several instances. Although the Court initially condemned the concept, it became tolerant of open competition during the 1920s.

The first rule of reason era, therefore, illustrates how conflicting visions may coexist in antitrust law and even evolve simultaneously. It also demonstrates that a technocracy may go astray.

C. The Fairness Era, 1935-1975

Antitrust’s fairness era emerged from the repudiation of laissez-faire constitutionalism and the collapse of the associative state vision. It took place from the 1935 demise of the NIRA to the 1975 retirement of Justice William Douglas, who was the most dogmatic advocate of the fairness vision on the Supreme Court to date.

The Sugar Institute (1936) may be the most important landmark representing the transition from the first rule of reason era to the

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70. See, e.g., Eddy, supra note 51, at 118-45.
fairness era. The case concerned a trade association of sugar refiners that operated an elaborate system for information exchange. The government argued that the information exchange facilitated price fixing and sought to dissolve the trade association. The government filed its complaint in 1931, about two years before Congress enacted the NIRA. The case reached the Supreme Court, which delivered a victory to the government in 1936, almost a year after the Court struck down the NIRA. The Sugar Institute was the most complex antitrust case since Standard Oil (1911) and the most significant attack on trade associations.

In January 1935, a few months before the Supreme Court struck down the NIRA, the Justice Department filed criminal charges against an alleged conspiracy among film distributors. It described the action, known as the St. Louis Trust Case, as the “most far-reaching antitrust action in many years,” and “an ‘anti-monopolistic’ campaign ... to convince all American business that the antitrust laws had not been entirely suspended through the liberties granted by the National Industrial Recovery Act.” The Justice Department also emphasized that President Roosevelt approved the action. The declarations were exaggerated. The St. Louis Trust Case was not nearly as complex as The Sugar Institute and ended in defeat for the government. Its promotion as a campaign intending to revive confidence in antitrust law, however, marks a transition from the limited enforcement of the first rule of reason era to aggressive antitrust enforcement. Other lawsuits challenging the legality of

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76. Sugar Inst., 297 U.S. at 579-81.
77. Id. at 596.
78. Id. at 553.
81. See, e.g., St. Louis Probe as Test if Trust Laws Live, MOTION PICTURE DAILY, Jan. 8, 1935, at 1 (“Fortified by President Roosevelt’s support, the Department of Justice is out to show industry and the nation at large that the anti-trust laws have survived the New Deal.”).
82. See Jury Acquits Defendants in St. Louis Trust Case, MOTION PICTURE DAILY, Nov. 12, 1935, at 1 (“Every resource of the Department of Justice has been brought to bear to prove conspiracy in restraint of trade.”).
arrangements in the spirit of associationalism were more successful.83

During the fairness era, antitrust law and policy premised that large businesses and vertical arrangements tend to exclude competition,84 that horizontal market arrangements tend to be collusive,85 that intellectual property rights convey monopoly power,86 and that the corporate form defines the boundaries of economic units.87 Guided by these premises, antitrust law in the fairness era was hostile toward defendants and enforced aggressively. Significant developments that represent the spirit of the fairness era included the 1936 Robinson-Patman Act, which protected small businesses;88 the 1950 Celler-Kefauver Act, which was an anti-merger statute;89 the 1968 merger guidelines, which formulated economic standards for merger review; the adoption of presumptions about competitive harm, such as per se rules that outlawed horizontal and vertical arrangements;90 the Philadelphia National Bank (PNB) presumption, which states that horizontal mergers that increase concentration harm competition,91 and the presumption


that intellectual property rights convey market power;\textsuperscript{92} the development of conspiracy inference standards, which offered some guidance for proof of conspiracy with circumstantial evidence;\textsuperscript{93} doctrinal standards for the relationship between antitrust and regulation;\textsuperscript{94} and repudiation of the associative state vision.\textsuperscript{95}

Throughout the fairness era, courts praised aggressive antitrust enforcement, likening antitrust law to constitutional law and describing antitrust as the “Magna Carta of free enterprise” and a “charter of economic liberty.”\textsuperscript{96} Courts also used similar analogies before and after the fairness era but less forcefully.\textsuperscript{97}


\textsuperscript{95} See, e.g., Fashion Originators’ Guild of Am. v. FTC, 312 U.S. 457 (1941); \textit{Socony-Vacuum}, 310 U.S. 150; Sugar Inst., Inc. v. United States, 297 U.S. 553 (1936); see also \textit{Find Trust Abuses in Sugar Institute}, \textit{N.Y. Times}, Mar. 31, 1936, at 1 (arguing that the Sugar Institute decision would “vitality affect the course of 2,000 trade associations”).

\textsuperscript{96} See, e.g., \textit{Flood v. Kuhn}, 407 U.S. 258, 291 (1972); United States v. Topco Assocs., 405 U.S. 586, 610 (1972) describing antitrust law as “the Magna Carta of free enterprise” and stating that antitrust law is “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms”; Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) (“Every violation of the antitrust laws is a blow to the free-enterprise system.”); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 675 (1965) (Douglas, J., concurring) (stating that the antitrust laws express the “philosophy of the free enterprise”); \textit{Phila. Nat’l Bank}, 374 U.S. at 372 (“[C]ompetition is our fundamental national economic policy.”); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 385 (1956) (“The Sherman Act has received long and careful application ... to achieve for the Nation the freedom of enterprise.”); \textit{Socony-Vacuum}, 310 U.S. at 221 (characterizing the Sherman Act as a “charter of freedom”); \textit{Sugar Inst.}, 297 U.S. at 605 (“[T]he Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions.”).

Antitrust commentators often describe the years of the Warren Court (1953-1969) as a distinctive period in antitrust history.\textsuperscript{98} The Warren Court was suspicious of businesses and distrustful of markets. It understood “competition” to mean markets with large numbers of small competitors, and thus, was particularly hostile toward mergers and acquisitions.\textsuperscript{99} The fairness vision, however, dominated antitrust policies for two decades before Chief Justice Earl Warren was confirmed and for a few years after Warren’s retirement.

Since the rise of the Chicago School, the fairness vision has been a popular punching bag of antitrust commentators. Critiques of the era emphasize its incoherent goals and enforcement zeal. This zeal, however, rested on then-popular economic theories that tied market structure to competition (the structure-conduct-performance paradigm).\textsuperscript{100}

\textit{D. The Second Rule of Reason Era, 1975-?}

Antitrust’s second rule of reason era began in the mid-1970s and its spirit still dominates antitrust law. Future studies will identify events that would symbolize the end of the era. Several antitrust landmarks symbolize the beginning of the era. \textit{General Dynamics} (1974) approved a challenged merger, effectively ending the fairness era’s hostility toward mergers.\textsuperscript{101} The 1976 Hart-Scott-Rodino Antitrust Improvements Act turned merger review into an

\begin{footnotesize}
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\item 98. See Thomas E. Kauper, \textit{The “Warren Court” and the Antitrust Laws: Of Economics, Populism, and Cynicism}, 67 MICH. L. REV. 325, 325 (1968) (“No one could quarrel with the simple assertion that the so-called “Warren Court” has had a significant, if indeed not extraordinary, impact on the development of the antitrust laws.”); Tony A. Freyer, \textit{What Was Warren Court Antitrust?}, 2009 S. CT. REV. 347, 347.
\end{itemize}
\end{footnotesize}
But more than anything else, three 1977 Supreme Court decisions declared the change in attitude—\textit{GTE Sylvania, Brunswick, and Illinois Brick}.\textsuperscript{103} \textit{GTE Sylvania} held that courts should apply the rule of reason to nonprice vertical restraints and declared that “demonstrable economic effect rather than ... formalistic line drawing” should direct antitrust analysis.\textsuperscript{104} \textit{Brunswick} introduced the antitrust injury doctrine,\textsuperscript{105} and \textit{Illinois Brick} introduced the direct purchaser doctrine.\textsuperscript{106} I call this period the “second rule of reason era” because a defining characteristic of the era is the growing use of reasonableness standards to narrow the scope of antitrust law.

The most persistent characteristic of the second rule of reason era is the Supreme Court’s capture by laissez-faire ideas, which has been growing with the changes in the composition of the Court. Since the mid-1970s, and at a faster pace since the confirmation of Chief Justice Roberts, the Supreme Court has expanded corporate rights at the expense of individual rights.\textsuperscript{107} Vast literature examines this drift, mostly with sharp criticism. Legal historians broadly agree that the Supreme Court’s adoption and development of constitutional corporate rights have been neither informed nor thoughtful.\textsuperscript{108} Likewise, corporate scholars have been critical of the Court’s interpretation of corporate rights. For example, Leo Strine, the

\begin{thebibliography}{99}

\bibitem{104} \textit{GTE Sylvania}, 433 U.S. at 59.
\bibitem{105} \textit{Brunswick}, 429 U.S. at 489.
\bibitem{106} \textit{Ill. Brick}, 431 U.S. at 729-36.
\end{thebibliography}
Chief Justice of the Delaware Supreme Court, published a series of articles questioning the soundness of the Supreme Court’s claims about corporations and corporate law.109 The evolution of antitrust law has closely followed this trend.

Since the mid-1970s, the Supreme Court has persistently narrowed the substantive scope of antitrust law, adopting procedural barriers, and dismantling doctrines associated with the fairness vision.110 Among other things, the Court moved from glorification to skepticism of the effectiveness of antitrust enforcement, emphasizing concerns regarding the costs of false positives;111 replaced per se rules with the rule of reason;112 abandoned exaggerated concerns about exclusionary practices in favor of skepticism of the viability of exclusionary conduct;113 reversed judicial premises regarding the competitive effects of unilateral conduct and vertical restraints;114 overruled the intraenterprise conspiracy doctrine;115 withdrew from the premise that intellectual property rights convey market power;116 reinterpreted the implied immunity doctrine to trim the reach of antitrust law;117 and piled up procedural standards that are favorable to antitrust defendants.118


110. See Barak Orbach, Antitrust Stare Decisis, ANTITRUST SOURCE, Oct. 2015.

111. See supra notes 6-8 and accompanying text.

112. See Orbach, supra note 110.


118. See, e.g., Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Bell Atl. Corp.
Although the transformation of antitrust law in recent decades has been consistent with changes in the Supreme Court’s jurisprudence, antitrust scholars tend to credit the so-called Chicago School with the reorientation of antitrust law.\(^{119}\) The Chicago School produced an elegant and accessible analytical framework that supports laissez-faire sentiments. It offered economics as the only legitimate methodology for antitrust analysis and promoted a false equivalence between economics and laissez faire. The Chicago School dominated antitrust thinking in the 1970s and 1980s and still guides the antitrust narrative of the Supreme Court. Most antitrust scholars, however, distance themselves from the broad and unqualified claims of the Chicago School of Antitrust Analysis. Herbert Hovenkamp coined the term “post-Chicago economics” to describe the growing differences between the evolving antitrust economics and the rigid Chicago School’s framework.\(^{120}\)

Several decisions of the Supreme Court from the 1990s, chiefly *Kodak* (1992) and *California Dental Association* (1999),\(^ {121}\) inspired beliefs (or hopes) that the Court was moving away from the Chicago School framework toward post-Chicago economics. These beliefs proved mistaken. While the Court’s use of a quasi-economics narrative is celebrated in certain political and ideological circles, it has little to do with contemporary antitrust economics.

In sum, the second rule of reason era is typically described as a product of a stunning takeover of antitrust law by laissez-faire ideas that scholars associated with the Chicago School promoted.\(^ {122}\) It is, however, important to recognize that the so-called “Chicago School revolution” mostly offered rationales for ideological preferences that


\(^{122}\) See, e.g., Pitofsky, *supra* note 119.
have guided the Supreme Court in recent decades and are likely to continue dominating the Court in the foreseeable future.

II. THE PRESENT ERA

Dramatic changes in the economy and attitudes toward antitrust law suggest that a new antitrust era is already here. No longer is antitrust law a neglected specialized area. The digital revolution that began in the mid-1970s revived old debates about how society should address disrupting technologies, large corporations, and economic disparities.123 Renewed fairness sentiments captured the public in the aftermath of the Great Recession, offering political and attention capital for populist voices that demand “fair trade” and action against large corporations. The resurrection of the fairness vision, however, is yet to influence the direction of antitrust policy. There are no signs that the Supreme Court is about to revisit its approach to antitrust. Antitrust enforcement during the Trump Administration lost vigor, with the exception of actions that appear politically motivated.124 Nonetheless, tensions between influential laissez-faire sentiments and public anxieties have empowered voices demanding reevaluation of antitrust policies.

Long-term trends triggered by the digital revolution parallel trends caused by the Second Industrial Revolution at the turn of the nineteenth century.125 Both waves of rapid technological change signify a transition from an “old economy” to a “new economy.”126 The new economy of the Second Industrial Revolution is today’s old economy.127 In both periods, the organization of production and


127. See, e.g., Carol A. Corrado & Charles R. Hulten, How Do You Measure a “Technological
distribution in the economy radically changed,128 new forms of businesses appeared,129 business titans emerged and acquired control over large segments of the economy,130 concentration in markets soared,131 income and wealth inequalities grew,132 automation reshaped labor markets,133 productivity growth rates were disappointing,134 social discontent and anxieties dramatically increased,135


134. See, e.g., MARK P. KEIGHTLEY & JEFFREY M. STUPAR, CONG. RESEARCH SERV., R44543, SLOW GROWTH IN THE CURRENT U.S. ECONOMIC EXPANSION (2016); S. TEMP. NAT’L ECON.
populist movements influenced the political process and public policies, and laissez-faire sentiments dominated the jurisprudence of the Supreme Court.

The similarities between present conditions and the conditions at the turn of the nineteenth century offer a glimpse into the likely future of antitrust law. In both periods, the disruption of markets and transformation of the economy resulted in a skewed distribution of gains and losses. A few accumulated vast fortunes and economic power, while many suffered losses and were unable to integrate in the new economy. This pattern of growing economic disparities, in turn, proved conducive to public anxieties, social discontent, radical populism, and ill-conceived public policies. In both periods, the Supreme Court blundered into radical laissez-faire constitutionalism. The Court’s jurisprudence at the turn of the nineteenth century, which became known as *Lochnerism*, earned broad condemnation and repudiation. The Court’s jurisprudence in recent decades is likely to follow a similar path. The Court is already

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137. In *Trans-Missouri*, Justice Peckham described the “small dealers and worthy men ... who [were] unable to readjust themselves to their altered surroundings.” United States v. Trans-Mo. Freight Ass’n, 166 U.S. 280, 323, (1897).

138. Orbach, supra note 125, at 6-11.

perceived as ideological, hostile to public restrictions on businesses, and dismissive of concerns regarding restraints of trade.\textsuperscript{140}

Thus, while it may take time until antitrust law changes direction again, the present conditions suggest that demands to reorient antitrust law are likely to grow. If history is any guide, we should expect to see at least a partial reversal from the landmark developments of the second rule of reason era. Specifically, doctrines related to unilateral conduct, exclusionary practices, vertical restraints, and conspiracy inference are likely to be modified and become less protective of antitrust defendants.

\textit{The Return of Bigness}


\textsuperscript{140} See Coates IV, supra note 107, at 269-70 (comparing the development of corporate rights in the \textit{Lochner} era and in recent decades, and arguing that the present expansion of corporate rights “undermines the rule of law”).
CONCLUSION: THE VIRTUES OF MODERATION

Antitrust law’s core function is delicate: It imposes restrictions on economic freedom of businesses to reduce unreasonable harm to competition caused by restraints of trade that businesses would otherwise use. The fairness, laissez-faire, and technocracy visions, which have shaped the evolution of antitrust law, present different approaches to this function. The fairness vision emphasizes concerns about restraints of trade, the laissez-faire vision focuses on the costs of antitrust enforcement, and the technocracy vision presumes that enforcement institutions run by experts effectively protect market competition.

Commentators identify cycles of zeal in the evolution of antitrust law and sometimes describe those through pendulum metaphors.141 In the spirit of these metaphors, it is broadly understood that the

second rule of reason era will end sometime. This end, I argue, is already here, though the transition to a new period may linger because of the ideological radicalization of the Supreme Court.